U.S. Department of Labor
Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105
(415) 744-6577
(415) 744-6569 (Fax)

ISSUE DATE: 26 February 2004

CASE NO.: 2002-LHC-02122
OWCP NO.: 07-105398

In the Matter of:

CHRISTOPHER HEAVIN,
Claimant,
vs.
CHEVRON, U.S.A., INC.,
Employer,
and
CRAWFORD & COMPANY,
Carrier

Appearances: Eric A. Dupree, Esquire,
For the Claimant

James P. Aleccia, Esquire
For the Employer/Carrier

Pamela W. McKee, Esquire
For the Party in Interest

Before: Jennifer Gee
Administrative Law Judge

ORDER GRANTING REQUEST FOR MODIFICATION OF DECISION

This matter involves a claim for disability benefits filed by the Claimant, Christopher Heavin, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. ("the Act"). At the hearing on March 11, 2003, in San Diego, California, the Claimant sought a determination of permanent total disability arising from industrial injuries he suffered on October 13, 1986, when he fell 40 feet from an offshore drilling platform while working for Chevron USA.

I issued a Decision and Order Granting Permanent Total Disability Benefits on December 11, 2003, finding that the Claimant reached maximum medical improvement on July 6, 1988, and awarding him permanent total disability benefits. I also specifically found that the Claimant was totally disabled from March 13, 1998 to March 15, 1999, while he underwent Interferon treatment. The Claimant has filed a Motion for Reconsideration asking for clarification and additional findings. The Claimant seeks the following:

1. A finding that the Claimant is entitled to temporary total disability benefits from the date of the injury through July 5, 1988;

2. Clarification concerning the Claimant's entitlement to permanent total disability benefits from March 13, 1998 through March 15, 1999, when he was receiving his Interferon treatment;

3. A finding that the Claimant is entitled to reimbursement for the cost of medical testing performed by Dr. Thomas J. Wegman;

4. A finding that the Claimant is entitled to penalties and interest.

The Claimant's Entitlement to Temporary Total Disability Benefits from the Date of the Injury through July 5, 1988

The Claimant asks for a finding that he is entitled to temporary total disability benefits from the date of his injury through July 5, 1988, the day before he reached maximum medical improvement. The Respondents do not dispute the Claimant's entitlement to temporary total disability benefits before he reached maximum medical improvement but object to the temporary total disability benefits beginning with the date of injury.

I agree with Respondents that the Claimant's temporary total disability benefits should run from the day after his injury, which is October 14, 1986. Accordingly, this modification is GRANTED as modified.

The Claimant's Entitlement to Permanent Total Disability Benefits from March 13, 1998 through March 15, 1999

In my Decision, I awarded the Claimant permanent total disability benefits beginning July 6, 1988, the day after he reached maximum medical improvement. I also separately found that he was totally disabled from March 13, 1998 through March 15, 1999, while he was receiving Interferon treatment. This latter finding was at the request of the Claimant.

Pursuant to this finding, I ordered the Respondents to pay the Claimant total disability benefits, as opposed to permanent total disability benefits, during that time period. Respondents

argue that he should receive temporary total disability benefits while he was receiving Interferon treatment.

The award of temporary and permanent total disability benefits for the period when the Claimant was receiving Interferon treatment are in conflict and warrants clarification. My finding that the Claimant was totally disabled while receiving Interferon treatment was an alternative basis for his total disability for that time period. I did find that the Claimant reached maximum medical improvement on July 5, 1988, and should be awarded permanent total disability benefits beginning July 6, 1988. I did not intend to award the Claimant temporary total disability benefits in lieu of the permanent total disability benefits he would otherwise be entitled to while he was undergoing Interferon therapy. My Order to the contrary was in error.

Accordingly, this request for modification is GRANTED. The Claimant is entitled to permanent total disability benefits beginning July 6, 1988, including the period from March 13, 1998 through March 15, 1999.

The Claimant's Entitlement to Reimbursement for the Cost of Medical Testing Performed by Dr. Thomas J. Wegman

The Claimant asks for a finding that he is entitled to be reimbursed by the Respondents for the six-day neuropsychological evaluation performed by Dr. Thomas J. Wegman. The Claimant's employer is liable for any medical expenses that were the natural and unavoidable result of his work injury. Atlantic Marine v. Bruce, 661 F.2d 898 (5th Cir. 1981). The Respondents do not contend that the Claimant's

need for the psychological testing stemmed from anything other than his October 13, 1986 accident.

It is understood that an employee cannot receive reimbursement for medical expenses unless he has first requested authorization prior to obtaining treatment. 20 C.F.R. §§ 702.421; *Lane v. Bell Helicopter Co.*, 36 BRBS 111 (1999); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curiam), rev'g 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Brothers Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding*, 15 BRBS 299 (1983). Here, as required, the Claimant and his attorneys attempted to obtain authorization for Dr. Wegman's testing, but were repeatedly unsuccessful. (CX 16, p. 300-01, 313, 315, 325, 351-52.) After waiting five years after the first request for authorization, the Claimant proceeded with the testing on his own and incurred costs of $7,050.00. The Claimant has now paid the $7,050.00 invoice in full and is entitled to reimbursement for the full amount, as the testing was related to his October 13, 1986 injury.

Although the Respondents contend that they should not be held liable for the $7,050.00 invoice because it was not included as a trial exhibit and was not submitted as part of the Claimant's Pre-Trial Statement, they are liable for the full amount. The Claimant did include Dr. Wegman's first invoice in his Exhibits (CX 17, p. 449-50), but admits that he failed to include Dr. Wegman's second invoice for the remaining balance due. Regardless, the Respondents should have authorized the Claimant's neuropsychological evaluation by Dr. Wegman. Because they failed to authorize the evaluation, the Respondents must now reimburse the Claimant for the

$7,050.00 he paid.[1]

The Claimant's Entitlement to Interest and Penalties

Interest on Dr. Wegman's Invoice for $7,050.00

The Ninth Circuit has held that interest may be assessed against an employer on overdue medical expenses, whether reimbursement is owed to the provider or to the employee. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993), rev'g *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991). The Court explained: "The remedial purposes of the [Longshore] Act would be undermined if employers were allowed to withhold medical payment.....interest free." *Hunt*, 999 F.2d at 422. The Court further justified its position by pointing out "[t]he financial burden that medical costs impose on an injured employee is just as debilitating as the loss of income resulting from the employee's inability to work." Id. (quoting *Lazarus v. Chevron USA, Inc.* 958 F.2d 1297, 1302 (5th Cir. 1992)).

In this case, the Respondents failed to authorize the evaluation by Dr. Wegman and failed to reimburse the Claimant for the cost of the evaluation, thereby causing expenses paid by the Claimant for the evaluation, to become overdue. Therefore, the Respondents must not only reimburse the Claimant for the $7,050.00 he paid for the evaluation, but must also pay interest on that amount in accordance with 28 U.S.C. § 1961. *See Lane v. Bell Helicopter Co.*, 36 BRBS 111 (1999); *see also Yarbrough v. St. Bernard Well Service*

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[1] Dr. Wegman's second invoice was later added to the Claimant's trial Exhibits and now appears as CX 17, p. 450A.

Inc., 31 BRBS 243 (1997); *see also* 33 U.S.C. § 907. Interest should be computed from the date the Claimant made each payment[2] until the date the Claimant receives reimbursement from the Respondent. *See Eliason v. Nichols Bros. Boat Builders*, 34 BRBS 524 (2000).

Although the Claimant has also asked to be awarded penalties for the Respondents' failure to either authorize the evaluation or reimburse the Claimant, that request is denied as there is no authority allowing for penalties in such a situation.

Penalties for Underpaid Benefits up to the Date of the Notice of Controversion

Section 14(e) of the Act provides:

> (e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment. 2 The Claimant apparently paid Dr. Wegman's bill in two payments. Interest should run from the date of each payment.

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[2] The Claimant apparently paid Dr. Wegman's bills in two payments. Interest should run from the date of each payment.

33 U.S.C. § 914(e). In order to escape a penalty under Section 14(e), an employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981).

When a dispute arises over the amount of compensation due, even if some compensation has been voluntarily paid, the employer is required to file a notice of controversion if it chooses not to pay the compensation sought. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). If a claimant disputes the amount of benefits paid since the date of the injury and the employer fails to file a notice of controversion within 14 days of becoming aware of the dispute, a Section 14(e) penalty will be assessed on the disputed amount, dating back to the date of the injury. *Browder v. Dillingham Ship Repair*, 25 BRBS 88, 90 (1991). The employer's liability for the Section 14(e) penalty terminates with its filing of a notice of controversion. *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989).

In this case, the record indicates that the Respondents were notified of a dispute regarding the Claimant's average weekly wage on various occasions. First, in a letter to the U.S. Department of Labor, dated March 21, 1997, to which Crawford & Company was cc'ed, the Claimant's counsel listed the "Amount of Benefits" as one of the issues to be addressed at the Informal Hearing scheduled for March 24, 1997. (CX 14, p. 244-49.) Next, at the March 24, 1997 Informal Conference, the issue of the Claimant's average weekly wage was addressed. In a letter memorializing the Informal Conference, the Claims Examiner advised the

Insurance Carrier to provide all parties with a copy of the Claimant's wage records for the year prior to the date of injury, so that a determination could be made regarding the Claimant's average weekly wage. (CX 14, p. 261.) Finally, in both notices announcing the June 17, 1999 and July 13, 1999 Informal Conferences, the Office of Workers' Compensation Programs ("OWCP") listed the issues to be resolved and included "Average weekly wage/compensation rate." (CX 14, p. 240- 43.) Therefore, the Respondents had notice that there was a dispute regarding the Claimant's average weekly wage.

In order to escape Section 14(e) liability, an employer has to file a notice of controversion within 14 days of becoming aware of a dispute. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *see also DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981). If the employer fails to do so, a Section 14(e) penalty will be assessed on the disputed amount, dating back to the date of the injury. *Browder*, 25 BRBS at 91. Here, although the Respondents did file a notice of controversion, they failed to do so within 14 days of receiving notice of the average weekly wage dispute. The Respondents filed the notice of controversion on July 29, 1999 (CX 14, p. 227), more than two years after the Claimant's March 24, 1997 Informal Hearing, 58 days after notice of the June 17, 1999 Informal Conference was mailed by the OWCP on June 1, 1999, and 34 days after notice of the July 13, 1999 Informal Conference was mailed by the OWCP on June 25, 1999.[3] Because the

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[3] Although there is no Exhibit indicating the date the Respondents received the Notices of the Informal Conferences, it is assumed that the notices were delivered within seven days. (The Claimant's counsel received the first Notice on June 3, 1999, two days after it was mailed and the second Notice on June 28, 1999, three days after it was mailed.)

Respondents received notice of the average weekly wage issue on various occasions and still failed to timely file a notice of controversion, the Claimant is entitled to a Section 14(e) penalty for the difference between the amount the Respondents voluntarily paid the Claimant and the amount determined to be due.

An employer's Section 14(e) liability ceases on the date of the filing of the notice of controversion or on the date of the informal conference, whichever comes first. *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), aff'g in part and rev'g in part *Holston v. National Steel & Shipbuilding Co.*, 5 BRBS 794 (1977). After the average weekly wage issue arose in this case, the Informal Conference took place on March 24, 1997, more than two years before the Employer filed its notice of controversion on July 29, 1999. Therefore, because the March 24, 1997 Informal Conference preceded the Employer's July 29, 1999 notice of controversion, the Respondents are liable for a Section 14(e) penalty only until March 24, 1997. In sum, the Respondents shall pay a Section 14(e) penalty, assessed from October 14, 1986, the day after the Claimant's injury, until March 24, 1997, the date of the Informal Conference. *See id.*; *see also Browder*, 25 BRBS at 90-91.

ORDER

The Claimant's Motion for Reconsideration is GRANTED. The Order in my December 11, 2003 Decision and Order Granting Permanent Total Disability Benefits is hereby MODIFIED to read as follows:

1. The Employer, Chevron USA, Inc. and Crawford & Company, its carrier, shall make payments to the Claimant, for temporary total disability benefits from October 14, 1986 through July 5, 1988, based on an average weekly wage of $1,009.63 per week.

2. Chevron USA, Inc. and Crawford & Company shall make payments to the Claimant, for permanent total disability benefits beginning July 6, 1988, based on an average weekly wage of $1,009.63 per week.

3. Chevron USA, Inc. and Crawford & Company shall receive credit for temporary total disability payments made to the Claimant until January 6, 1996, and for temporary partial disability payments made to the Claimant since January 6, 1996.

4. Chevron USA, Inc. and Crawford & Company shall reimburse the Claimant in the amount of $1,976.29, for the prescribed Interferon that he purchased on his credit card.

5. Chevron USA, Inc. and Crawford & Company shall pay interest on each past due unpaid compensation payment from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. §§ 1961 and 33 U.S.C. §§ 914(e).

6. Chevron USA, Inc. and Crawford & Company shall reimburse the Claimant in the amount of $7,050.00 for the cost of medical testing performed by Dr. Thomas Wegman.

7. Chevron USA, Inc. and Crawford & Company

shall pay interest on the $7,050.00 owed to the Claimant from the date the Claimant made each payment of that bill until the date of reimbursement at the rates prescribed under the provisions of 28 U.S.C. §§ 1961 and 33 U.S.C. §§ 914(e).

8. Chevron USA, Inc. and Crawford & Company shall pay Section 14(e) penalties for the difference between the amount the Respondents voluntarily paid the Claimant and the amount determined to be due assessed from October 14, 1986 until March 24, 1997, the date of the Informal Conference.

9. The District Director shall make all calculations necessary to carry out this Order.

10. Chevron USA, Inc. and Crawford & Company shall authorize all requested medical evaluations and/or treatments relating to any of the Claimant's medical conditions referenced in this decision.

11. Chevron USA, Inc. and Crawford & Company shall authorize the Claimant's treatment for his psychological/psychiatric deficiencies, including his ongoing depressive disorder.

12. Chevron USA, Inc. and Crawford & Company shall provide compensation to University of California San Diego Medical Center for the 11 Interferon treatments it provided to the Claimant, should the Medical Center seek payment.

13. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel

within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the Respondent's Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for employer shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

/s/ Jennifer Gee

JENNIFER GEE
Administrative Law Judge